

FOR BOARD INFORMATION

September 28, 1999

L-99-11

TO : The Board

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Authority and Procedures for Coverage Investigations

This is in response to a memorandum of August 17, 1999, from the Chair, who has asked me to direct our reply to all three Board Members. That memorandum asked for clarification of the legal authority and agency procedures followed by the Audit and Compliance Section when initiating a coverage investigation. The following discussion is divided into three parts. Part One identifies the legal authority for the conduct of coverage investigations. Part Two explains the procedures generally followed in a coverage investigation. Part Three responds to the specific questions raised in the memorandum.

Part One C Legal Authority for Coverage Investigations

Authority for the Board to conduct coverage investigations is provided in section 7 of the Railroad Retirement Act (RRA) (45 U.S.C. ' 231f) and section 12 of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. ' 362). Each of these sections contains both a broad grant of authority to empower the Board to take actions which the Board deems necessary for proper administration of the RRA and the RUIA. In addition, each section grants the Board express authority to collect information required to administer the Acts. The best way to describe fully the scope of the statutory authority is to quote the relevant portions of the statutes.

Section 7(b)(1) provides in pertinent part that:

The Board shall have and exercise all the duties and powers necessary to administer this subchapter. The Board shall take such steps as may be necessary to enforce such subchapter and make awards and certify payments. [45 U.S.C. ' 231f(b)(1)].

Section 12(l) of the RUIA contains a similar broad grant of Anecessary and incidental powers@ to the Board, providing in pertinent part that:

In addition to the powers and duties expressly provided, the Board shall have and exercise all the powers and duties necessary to administer or incidental to administering this chapter. . . . [45 U.S.C. ' 362(l)].

Both Acts also give to the Board broad authority to gather information which the Board deems necessary to its proper administration of the Acts. Section 7(b)(6) of the RRA provides in pertinent part that:

The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary to assure proper administration of this subchapter The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this subchapter. . . . [45 U.S.C. ' 231f(b)(6)].

Section 7(b)(6) of the RRA is incorporated into the RUIA by section 12(l) of that Act.

Section 12(a) of the RUIA grants the Board even broader power to obtain information, providing in pertinent part that:

For the purpose of any investigation or other proceeding relative to the determination of any right to benefits, or relative to any other matter within its jurisdiction under this chapter, the Board shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, documentary or otherwise, that relates to any matter under investigation or in question, before the Board or any member, employee, or representative thereof. Any member of the Board or any of its employees or representatives designated by it may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and production of evidence may be required from any place in the United States or any Territory or possession thereof at any designated place of hearing. All subpoenas [sic] may be served and returned by anyone authorized by the Board in the same manner as is now provided by law for the service and return by United States

marshals of subpoenas [sic] in suits in equity. Such service may also be made by registered mail or by certified mail and in such case the return post-office receipt shall be proof of service. [45 U.S.C. ' 362(a)].

Section 12(a) of the RUIA is expressly incorporated into the RRA by section 7(b)(3) of the RRA.

Section 7(b)(5) of the RRA, which is incorporated into the RUIA by section 12(l) of that Act, authorizes the Board to establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of the Act. Section 7(b)(3) of the RRA and section 12(m) of the RUIA authorize the Board to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by the Acts, except for the power to prescribe rules and regulations.

In Part 259 of its regulations, the Board has chosen to delegate authority to conduct coverage investigations to the General Counsel or his designee (20 CFR 259.1). Since 1993, coverage investigations have been conducted by the Audit and Compliance Section of the Bureau of Fiscal Operations. The functions of that office with respect to coverage investigations is described in a Functional Statement approved by the Board in April 1993 as follows:

Reviews the activities of Employers/Employees to gather, verify, and analyze relevant information to enable the Board to make coverage determinations under the RRA and RUIA.

Part Two C Procedures Followed in Coverage Investigations¹

A. Investigations by Coverage Examiners

Most coverage investigations begin with correspondence to the entity involved. Audit and Compliance has two coverage examiners who conduct routine coverage investigations through correspondence, telephone calls, and research in printed publications, such as Moody's Transportation Manual and the Federal Register, and the Internet (e.g., the WEB site of the particular company involved). The examiners use questionnaires to solicit information from a prospective employer. The type of questionnaire sent depends on the business activity being conducted. For example, an entity which is operating a railroad is sent a short questionnaire which includes requests for its complete name, its chief executive officer, the beginning date of operations, the number of employees and the first date they were paid, a copy of the Surface Transportation Board decision which authorizes the railroad operation, a description of its operations, the length of track and terminal points, and the identity of other railroads with which it interchanges. An entity which is being investigated as a possible affiliate employer is sent a questionnaire which includes questions designed to elicit information about its ownership and control and about the services it conducts. Although Audit and Compliance has general questionnaires, those are frequently tailored with additional questions drafted in a particular case.

The coverage examiners meet periodically with the attorney advisor to review information gathered by the examiners. If there appears to be sufficient information on which to base a recommended coverage determination, the attorney advisor requests that a case be submitted to the Bureau of Law for preparation of a draft coverage decision. In other cases, the attorney advisor indicates what other information and/or documentation should be obtained by the examiner. Once a case is submitted to the Bureau of Law, a recommended coverage decision is drafted for submission to the three-member Board.

¹A copy of the ACoverage Guide@ prepared by the Audit and Compliance Section for use by its employees in conducting coverage investigations is attached.

2. On-Site Coverage Investigations by Auditors

Auditors assigned to the Audit and Compliance Section also conduct coverage investigations. In addition to using the same means used by the coverage examiners, the auditors may also conduct on-site visits. On-site coverage investigations are based on Board directed coverage referrals or referrals from district offices, employee complaints or cases where the coverage examiner has been unable to obtain the required information. Generally, coverage investigations by auditors are included on the annual audit plan approved by the Chief Financial Officer and submitted to the Board. When an on-site investigation is conducted, the auditor notifies the subject entity of the on-site visit and identifies information and documents the auditor will be seeking during the visit. The auditor will request information on any affiliated companies, temporary employees, employees who might have been removed from coverage under the RRA and RUIA and identified as FICA employees or as independent contractors, review of Forms 1099 and accounts payable. Questionnaires may be submitted to the company and/or individual(s) identified. At the time of the visit, the auditor holds an entrance conference with the subject entity to present his/her identification, explain the confidentiality of work papers and reports, and explain the objective, authority, scope, procedures, and estimated completion dates of the coverage investigation. The auditor advises the employer that the auditor only gathers information for submission to the Bureau of Law for preparation of a recommended coverage determination and that the three-member Board votes to determine each coverage case.

3. Coverage as Part of a Compliance Audit

An auditor may also conduct a coverage investigation as part of a compliance audit.² When a compliance audit has been scheduled by Audit and Compliance, the auditor telephones the company to notify it of the audit, the years involved in the audit, and the date and time for the auditor to visit the company to conduct the audit. The auditor then confirms those arrangements with a letter. Enclosed with the confirmation letter is an Information Document Request (IDR) which outlines information necessary to begin the audit. Documents ordinarily requested in the IDR include certain requests intended to obtain information to meet the objective of determining whether any coverage determination is necessary. Copies of a sample notification letter for a compliance audit, an IDR, and the portion of the Audit Guide which sets out the objective concerning coverage are attached. During the opening conference for an audit, the auditor will provide the company with documentation outlining the audit objectives and process. The documentation includes as one of the stated audit objectives that the auditor will identify potential companies and/or employees currently not covered under the RRA/RUIA who possibly should be covered.

²A compliance audit is one performed by Audit and Compliance to review whether employee service and compensation have been properly reported to the Board by an employer which has already been determined to be covered under the RRA and RUIA.

Part Three C Responses to Questions

1. What type of information, oral and/or written, is initially sent to the company being investigated?

In a routine coverage investigation being conducted by a coverage examiner, an inquiry letter is generally the initial information sent to the company being investigated. The letter may be one of the questionnaires referenced in the discussion in Part Two or, in the case of a particular situation, such as a possible name change or merger, sale, or termination of railroad operations of a covered employer, an inquiry seeking information and documentation to evidence the particular change.

In a coverage investigation conducted by an auditor which does not result from a compliance audit and which will include an on-site investigation, the auditor telephones the company to notify it that the auditor plans to visit the company for the purpose of conducting an investigation into the covered status of the company under the RRA and RUIA. The auditor subsequently sends written confirmation of the on-site investigation, including the dates, and at the same time, sends an Information Document Request (AIDR®) to the company, listing the information which the company will be requested to furnish to the auditor prior to and/or during the site visit. The information requested by the IDR would include such standard requests as one for an organizational chart for the company, as well as for any other particular information and documents that the auditor's research (conducted prior to scheduling an on-site visit)³ indicates might be necessary and/or helpful in making a coverage determination.

³The research would include a review of any existing agency coverage file concerning the company, resource books such as Moody's Transportation Manual, and information available on the Internet.

2. What procedures are followed by the agency auditor during an on-site investigation, and what information is provided to the company?

The auditor holds an entrance conference when he/she arrives at the company. The Coverage Guide indicates that during the entrance conference, the auditor will present identification, explain the confidentiality of work papers and reports, and explain the objectives of the on-site visit, the authority for the investigation, the scope of the investigation, the procedures the auditor will follow, and the estimated completion date.

The auditor advises the company that he/she is there to gather the facts only to present them to the Bureau of Law for preparation of a recommended coverage determination which will in turn be submitted to the three-member Board for consideration and approval. The auditor stresses that only the Board can make a coverage determination. After the entrance conference, the auditor proceeds to review the information requested in the IDR that has not previously been furnished and may also request additional information (i.e., copies of independent contractor agreements, descriptions of services performed, invoices, etc.) if the review indicates that such information should be requested. If the particular circumstances indicate that such might be necessary or helpful in performing the coverage investigation, the on-site visit might include a tour and photographs of the company's facilities. The auditor will generally conduct an exit conference to discuss the procedures followed in presenting the facts to the Board for a coverage determination and, if the auditor has had the time to prepare such and a response will be necessary from the employer, the auditor's draft report.

3. How are agency investigations coordinated with Office of Inspector General (OIG) investigations?

As a general rule, an agency investigation of a coverage issue is conducted without any involvement of the OIG. If, however, a coverage investigation being conducted by the Audit and Compliance Section reveals possible fraud, such case is immediately referred to the OIG for a criminal investigation, and the Audit and Compliance coverage investigation ceases. This referral is made in compliance with section 6.C.2 of Basic Board Order 1, which requires agency employees to refer to the OIG information indicating possible fraud, waste, abuse, or other forms of wrongdoing in the RRB's programs, and section 6.B.1, which requires all bureau and office heads to refer to the OIG Office of Investigations matters that appear to involve criminal activity, fraud, waste, abuse or other wrongdoing.

The current practice of suspending a coverage investigation in a case that is referred to the OIG is not directed by Board Order. An indefinite delay in a coverage investigation can impact adversely on the agency's administration of its programs.⁴ Thus, the question regarding the coordination of agency coverage investigations with investigations of the OIG raises the subsidiary questions of what role the Inspector General Act intended for the OIG to play in an agency and what role would be appropriate for the OIG to have in coverage cases. In order to answer those questions, we need to review the purpose of the Inspector General Act, the broad authority granted to an Inspector General by that Act, and a significant restriction which the Act places on the functions to be transferred by an agency to its Inspector General.

Section 2 of the Inspector General Act (IGA) states that its purpose is to create independent and objective units to conduct and supervise audits and investigations relating to the programs and operations of the agency, to provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness in the administration of the agency's programs and operations, to prevent and detect fraud and abuse in those programs and operations, and to provide a means for keeping the agency head and Congress informed about problems and deficiencies relating to the administration of the agency's programs and operations and the necessity for and progress of corrective action. In order to accomplish these goals, an Inspector General is authorized to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable and to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by the IGA [5 U.S.C. Appendix 3, ' ' 6(a)(2) and (4)]. In addition, the IGA authorizes an Inspector General to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the agency which relate to programs and operations with respect to which that Inspector General has responsibilities under the IGA [5 U.S.C. Appendix 3, ' 6(a)(1)].

⁴For example, suspension of an investigation of a possible new employer can delay issuance of a BA number, make crediting of compensation and service reports difficult, and interfere with the processing of sickness and unemployment insurance claims under the RUIA.

As originally enacted, the Inspector General Act of 1978 did not create a separate OIG for the Railroad Retirement Board. Congress created such office in 1983 in section 23 of the RRA. Section 23 was subsequently repealed in 1988, by Public Law 100-504, when provision for an office of Inspector General of the Railroad Retirement Board was placed in the IGA.

Section 9 of the IGA directs that certain offices within specified agencies and departments be transferred to the appropriate office of Inspector General. Section 9(a)(1)(S) transferred to the OIG of the Railroad Retirement Board the office of Inspector General originally provided for by section 23 of the Railroad Retirement Act of 1974. Section 9 of the IGA also provides in pertinent part that there shall be transferred to the Office of Inspector General:

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment⁵ involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, ***except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.*** (Emphasis supplied.) [5 U.S.C. Appendix 3, ' 9(a)(2)].

Congress enacted the IGA after receiving evidence of significant fraud, abuse, and waste in the operations of Federal departments and agencies and in federally funded programs. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2679. Congress concluded that the existing audit and investigative units were inadequate to deal with the problem of waste, fraud, and abuse because they reported to and were supervised by the officials whose programs they were to audit and investigate. *Id.*, at 5- 6. The IGA was drafted to address the underlying problem of waste, fraud, and abuse and the organizational defect. The Senate Report noted that the legislation gave to the Inspector General no conflicting policy responsibilities which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives

⁵Under the Inspector General Act, the Chair is the head of the establishment@ 5 U.S.C. Appendix 3, ' 11(1).

designed to promote the economy; efficiency and effectiveness of the programs of the establishment.@ Id., at 7. The Senate Report stressed that Aabove all@ the Inspector General Awould have the requisite independence to do an effective job.@ Id., at 7.

The House Report states clearly that the job of the OIG is essentially one of oversight:

While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility. H.R. Rep. No. 95-584, 95th Cong. 1st Sess., August 5, 1977, pp. 12-13.

Comments made by Congressman Levitas, one of the co-sponsors of the 1978 Act, on the House floor on April 18, 1978, explained that the purpose of creating an office of Inspector General was to provide an objective, independent reviewer of an agency's operations:

The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and *have no program responsibility* to divide allegiances. The Inspectors General will be responsible for audits and investigations only. They will report directly to the agency head and to Congress to alert them to particularly serious or flagrant problems, abuses or deficiencies. Their offices will also coordinate and recommend policies to promote economy and efficiency in the administration of programs and operations.

Moreover, the Offices of Inspector General would not be a new Alayer of bureaucracy@ to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars. 124 Cong. Rec. 10405 (1978). (Emphasis supplied.)

The language of the Inspector General Act clearly states, and its legislative history repeatedly emphasizes, that while an Inspector General has broad power to oversee an agency's operations,

he has no authority to conduct those operations himself.

Coverage investigations which are conducted in order to gather facts needed to make a determination of employer or employee status are a part of the program operating responsibilities of the Railroad Retirement Board. The agency is prohibited by the Inspector General Act from transferring to the OIG the agency's responsibility to perform coverage investigations. In other words, the agency may not delegate to the OIG the job of collecting facts which the Board needs to make coverage determinations. Nor may the OIG decide to take on that job [5 U.S.C. Appendix 3, ' 9(a)(2)]. Cf. Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d 631 (5th Cir. 1993).

The Burlington Northern case is instructive because the Court addressed the question of whether the OIG of the Railroad Retirement Board had properly undertaken a program function of the agency. In September 1988, the OIG began to audit railroads to check the accuracy of their reports of compensation and the amount of their taxes under the Railroad Retirement Tax Act and contributions under the RUIA. The OIG subsequently, in late 1989, entered a memorandum of understanding with the Internal Revenue Service to coordinate with that agency in examining the payment of employment taxes by railroads, 983 F.2d at 635. In March 1990, the OIG notified the Burlington Northern of its intent to audit the company. The Burlington Northern's dispute with the OIG regarding the authority of the Inspector General to conduct an audit of the company ultimately wound up in the United States Court of Appeals for the Fifth Circuit. The Court wrote that it is undisputed that, at least under the Railroad Unemployment Insurance Act, the RRB has the power to investigate or audit railroad employers to determine if they are accurately reporting creditable compensation and properly paying taxes.@ 983 F.2d at 633-

634. The Court held, however, that an Inspector General lacks statutory authority to conduct, as part of a long-term continuing plan, regulatory compliance investigations or audits. The Court defined regulatory compliance investigations or audits⁶ as follows:

... we mean those investigations or audits which are most appropriately viewed as being within the authority of the agency itself. Thus, as a general rule, when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly. 983 F.2d at 642.⁶

Applying the holding of the Burlington Northern decision to coverage investigations, it is clear that the OIG does not have authority to conduct a routine coverage investigation. The performance of routine coverage investigations is a necessary and, indeed, crucial -- part of the program operations of the Railroad Retirement Board. The Board could not pay benefits under either the RRA or RUIA without first determining what entities and individuals are covered as employers and employees under those Acts.

This conclusion is not meant to suggest that the OIG may not test the effectiveness of the way coverage investigations are performed. The Inspector General Act authorizes the Inspector General to make independent decisions as to how and when to investigate the agency's operation of its programs.⁶ Winters Ranch Partnership v. Viadero, 123 F.2d 327, 334 (5th Cir. 1997). Moreover, the IGA is clear that the Inspector General must refer instances of suspected violations of Federal criminal law. The Inspector General cannot, however, conduct agency responsibilities in the operation of the agency's programs, such as enforcement. It is, in our view, the

⁶The Fifth Circuit decision affirmed an earlier decision by the United States District Court for the Northern District of Texas, 767 F. Supp. 1379 (N.D. Tex. 1991), which also held that the Board's Inspector General lacked authority under the Inspector General Act to conduct an audit that was regulatory in nature. As a result of this decision, Congress specifically appropriated one million dollars for fiscal year 1993 in Public Law 102-394 (Oct. 6, 1992, 106 Stat. 1792) to allow the Board to conduct compliance reviews of reports of service and compensation. The Board used the money appropriated to establish the Audit and Compliance section.

responsibility of the agency to conduct enforcement responsibilities, such as payment of RUIA

contributions and reporting of compensation and service under the RRA and RUIA. If, in carrying out the agency's program responsibilities, agency staff have reason to believe that a crime, such as fraud, has been committed, the agency can refer the case to the OIG for further investigation.

4. Is there a sharing of information between the OIG and the agency?

Both the Audit and Compliance Section and the Bureau of Law furnish coverage information to the OIG upon request from that office. The OIG generally does not release its files to Audit and Compliance or to the Bureau of Law.

5. What happens when the agency and the OIG are investigating the same company at the same time?

As indicated in response to question 3, the Audit and Compliance Section ceases its coverage investigation in a case which the Section refers to the OIG for investigation of possible fraud. In addition, Audit and Compliance generally suspends its investigation of a company where the OIG begins an investigation without a referral from Audit and Compliance. This action of suspending an investigation is not a particularly desirable or efficient means of handling cases, as it can delay indefinitely action necessary to the proper administration of the RRA and the RUIA.

Attachments